34

(5)

Supreme Court, U.S.
FILED
MAY 21 2007
OFFICE OF THE CLERK

No. 06-929

In the Supreme Court of the United States

ANTONIO RODRIGUEZ-ZAPATA,

Petitioner,

v.

ALBERTO R. GONZALES,
UNITED STATES ATTORNEY GENERAL,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

REPLY BRIEF FOR PETITIONER

J. BRETT BUSBY
Counsel of Record
AMY P. MOHAN
Mayer, Brown, Rowe & Maw LLP
700 Louisiana St., Suite 3400
Houston, TX 77002
(713) 238-3000

Counsel for Petitioner

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

A. The circuits are deeply divided over the role of reliance in retroactivity analysis. 1

B. The decision below conflicts with this Court's retroactivity precedent. 5

C. The Court should take this opportunity to resolve the split regarding reliance. 7

D. The circuit split over due process protection for the right to seek § 212(c) relief is genuine and should be resolved. 9

CONCLUSION 10

TABLE OF AUTHORITIES

Page(s)

CASES

Abdul-Kabir v. *Quarterman*,
127 S. Ct. 1654 (2007) 7

Accardi v. *Shaughnessy*,
347 U.S. 260 (1954) 10

Atkinson v. *Attorney General*,
479 F.3d 222 (3d Cir. 2007) ..... *passim*

Bridges v. *Wixon*,
326 U.S. 135 (1945) 7

Carranza-de Salinas v. *Gonzales*,
477 F.3d 200 (5th Cir. 2007) ..... *passim*

Chambers v. *Reno*,
307 F.3d 284 (4th Cir. 2002) 5

Fernandez-Vargas v. *Gonzales*
126 S. Ct. 2422 (2006) 6

Hem v. *Maurer*,
458 F.3d. 1185 (10th Cir. 2006) 2, 3, 4

Hernandez-Castillo v. *Moore*,
436 F.3d 516 (5th Cir. 2006),
cert. denied, 127 S. Ct. 40 (2006) 3

INS v. *St. Cyr*,
533 U.S. 289 (2001) 5, 6, 7, 8

Landgraf v. *USI Film Prods.*,
511 U.S. 244 (1994) 6, 8

TABLE OF AUTHORITIES—continued

Page(s)

Olatunji v. *Ashcroft*,
387 F.3d 383 (4th Cir. 2004) 2, 3, 4, 5

Ponnapula v. *Ashcroft*,
373 F.3d 480 (3d Cir. 2004) 4

Regions Hospital v. *Shalala*,
522 U.S. 448 (1998) 8

Restrepo v. *McElroy*,
369 F.3d 627 (2d Cir. 2004) 3, 4

St. Cyr v. *INS*,
229 F.3d 406 (2d Cir. 2000) 6

Sweet v. *Sheahan*,
235 F.3d 80 (2d Cir. 2000) 8

Thom v. *Ashcroft*,
369 F.3d 158 (2d Cir. 2004),
cert. denied, 125 S. Ct. 40 (2005) 6

United States v. *Copeland*,
376 F.3d 61 (2d Cir. 2004) 9

United States v. *Estate of Romani*,
523 U.S. 517 (1998) 7

United States v. *Ubaldo-Figueroa*,
364 F.3d 1042 (9th Cir. 2004) 9

TABLE OF AUTHORITIES—continued

Page(s)

STATUTES, RULES, AND REGULATIONS

8 C.F.R. § 212.3(b) 9

8 C.F.R. § 1003.44 8

8 U.S.C. § 1182(c) ("§ 212(c)") ..... *passim*

8 C.F.R. § 1212.3 ..... 8, 9

Illegal Immigration Reform and Immigrant Responsibility Act ("IIRIRA") 110 Stat. 3009 (1996), § 304(b) ..... *passim*

Section 212(c), Relief for Aliens With Certain Criminal Convictions Before April 1, 1997, 69 Fed. Reg. 57,826 (2004) 8

The Government's brief sidesteps the substantial circuit split over the role of reliance in retroactivity analysis. Instead, it asks whether Rodriguez-Zapata would prevail under the circuits' various standards for deciding whether aliens convicted prior to IIRIRA remain eligible for § 212(c) relief. It is the split regarding reliance, however, that led the circuits to adopt this jumble of conflicting standards and "carve-outs" for § 212(c) eligibility. This Court's review is needed to resolve the split and ensure uniformity.

Moreover, the recent decision in *Atkinson* v. *Attorney General*, 479 F.3d 222, 230-31 (3d Cir. 2007), confirms that Rodriguez-Zapata would prevail under the Third Circuit standard. *Atkinson* deepened the circuit split over the retroactive application of IIRIRA § 304(b), holding that aliens convicted of an aggravated felony by a jury prior to IIRIRA remain eligible to seek § 212(c) relief even without showing reliance on prior law. The Government concedes (at 13) that *Atkinson* is in direct conflict with the Fifth Circuit's decision in this case. Though the Government attacks the reasoning of *Atkinson*, its merits-based arguments do not lessen the need for this Court to resolve the split. In any event, *Atkinson* is consistent with this Court's retroactivity precedent.

The Government also contends that Rodriguez-Zapata's due process claim is "academic." Yet it fails to recognize that Rodriguez-Zapata's statutory right to seek § 212(c) relief vested well before the passage of IIRIRA. The circuits are split regarding whether a vested right to seek discretionary relief is subject to due process protection, and this Court's review is needed to resolve that important issue.

A. The circuits are deeply divided over the role of reliance in retroactivity analysis.

In an effort to explain away the circuit split on reliance, the Government spends much of its brief analyzing whether Rodriguez-Zapata would prevail under the various standards that the circuits use to determine whether an alien can seek relief under former § 212(c). Yet this approach only serves to

highlight that Rodriguez-Zapata would prevail under the Third Circuit's recent decision in *Atkinson*, which the Government concedes is in direct conflict with the Fifth Circuit's holding in this case. Opp. 13. In addition to the procedural and factual distinctions that make this case a better vehicle for decision than past petitions (see Pet. 15-16), *Atkinson* provides another compelling reason for the Court to grant certiorari now even though it has previously denied petitions raising similar questions.

Moreover, the Government's response sidesteps the important circuit split over the role of reliance in retroactivity analysis, which has had pernicious effects both within and outside the immigration context. Pet. 14-16. It is this split over reliance that led the circuits to adopt conflicting standards and carve-outs for deciding which aliens remain eligible for § 212(c) relief. Pet. 10-14; Opp. 5-6, 8-11. Given the significant constitutional interest in uniform application of immigration laws (Pet. 3), the Court should grant this petition to resolve the conflict and clarify its retroactivity precedent.

Nine circuits have weighed in on this recurring reliance issue, creating a three-way circuit split that is ripe for this Court to address. *Olatunji*, 387 F.3d at 390 (noting "substantial confusion as to whether a party must prove some form of reliance in order to demonstrate that a statute is impermissibly retroactive"). The lower courts recognize that this issue is an important one worthy of this Court's review. *Hem*, 458 F.3d at 1191 (split concerns "essential" issue of "whether reliance must be established objectively, subjectively, or even at all" in analyzing retroactivity of IIRIRA § 304(b)).

Six circuits, including the Fifth, have held that an alien must show "actual" or "subjective" reliance on prior law to avoid retroactive application of IIRIRA § 304(b). In most of these circuits, only aliens who pled guilty to an aggravated felony meet this test. Pet. 11-12; Opp. 5-6, 8. The Fifth Circuit recently reaffirmed its standard in *Carranza-de Salinas* v. *Gonzales*, 477 F.3d 200, 205 (5th Cir. 2007), stating that

"[a]fter *Hernandez-Castillo*, this circuit requires an applicant who alleges continued eligibility for § 212(c) relief to demonstrate *actual, subjective reliance* on the pre-IIRIRA state of the law to be eligible for relief from its retroactive application." (emphasis added).[1]

By contrast, the Third, Fourth, and Tenth Circuits have adopted different retroactivity standards that carve out additional classes of aliens who remain eligible for relief. See *Atkinson*, 479 F.3d at 229 (3d Cir.) (reliance is only a "factor" in retroactivity analysis); *Hem*, 458 F.3d. at 1199-1200 (10th Cir.) (holding that alien must only show "reasonable reliance" on prior law to avoid retroactive application of IIRIRA § 304(b)); *Olatunji*, 387 F.3d at 388-89 (4th Cir.) (holding that no showing of reliance is required to establish impermissible retroactivity). Rodriguez-Zapata's case would have been analyzed far differently and would have reached a different outcome under the retroactivity standards of these circuits.

In *Atkinson*, the Third Circuit held that aliens like Rodriguez-Zapata, who were convicted of an aggravated felony by a jury prior to IIRIRA, remain eligible to seek § 212(c) relief. 479 F.3d at 231. The court reasoned:

> IIRIRA has plainly attached new legal consequences to [the petitioner's] conviction. See *Olatunji*, 387 F.3d at 396. Prior to IIRIRA's enactment, [the petitioner] remained free to apply for a waiver under section 212(c) despite his conviction of an aggravated felony. After IIRIRA, he lost that right; applying basic principles of retroactivity, IIRIRA attached a new

[1] Demonstrating the difficulty of applying this subjective reliance standard uniformly, *Carranza-de Salinas* held that aliens who deferred applying for § 212(c) relief "in order to establish a stronger record of rehabilitation" may also remain eligible for relief. 477 F.3d at 202. Only the Second Circuit has adopted a similar carve-out. *Restrepo* v. *McElroy*, 369 F.3d 627, 633-39 (2d Cir. 2004).

> legal consequence to [the petitioner's] conviction: the certainty—rather than the possibility—of deportation. Such a change in legal consequences based on events completed before IIRIRA's enactment constitutes an impermissible retroactive effect.

Id. at 230. *Atkinson* removed any confusion created by *Ponnapula*'s "reasonable reliance" standard, which had carved out aliens who turned down plea agreements. 373 F.3d at 483. Instead, *Atkinson* squarely held that aliens like Rodriguez-Zapata remain eligible for § 212(c) relief regardless of whether they relied on prior law. 479 F.3d at 230.

Rodriguez-Zapata would also prevail under the Tenth Circuit's "reasonable reliance" standard. In *Hem*, the Tenth Circuit carved out a class of aliens who were convicted by juries and chose to forgo appeals of their convictions, holding that they remained eligible for § 212(c) relief because they may have "reasonably been motivated by [its] availability." 458 F.3d at 1199. Rodriguez-Zapata falls squarely within this class of aliens and thus need not show individual reliance on prior law. See *id.* at 1196 (rejecting "subjective/actual reliance" standard). The record does not indicate that he pursued an appeal of his conviction, and an independent search of public records likewise revealed no appeal. In any event, because he was never allowed to establish a record on his retroactivity claim before the BIA, Rodriguez-Zapata should be given an opportunity on remand to present evidence that he chose to forgo an appeal or otherwise relied on the continued availability of § 212(c) relief. *Carranza-de Salinas*, 477 F.3d at 209-210; *Restrepo*, 369 F.3d at 632-33 & n.10.

Finally, Rodriguez-Zapata would prevail under the Fourth Circuit's retroactivity standard. In *Olatunji*, the Fourth Circuit held unequivocally that "reliance (whether subjective or objective) is not a requirement of impermissible retroactivity." 387 F.3d at 388-89. It is true that *Olatunji* involved a different provision of IIRIRA than the one at issue in this case. The Fifth Circuit's decision here, however, hinged on

Rodriguez-Zapata's purported lack of reliance on prior law. Pet. App. 2a. Thus, under *Olatunji*'s "no reliance" standard, his case undoubtedly would have been analyzed differently and likely would have reached a different result.[2]

This circuit split over the role of reliance is significant and has become even more entrenched. The Court should take this opportunity to resolve the split and clarify its retroactivity precedent.

B. The decision below conflicts with this Court's retroactivity precedent.

The Government also misinterprets this Court's retroactivity precedent, which demonstrates that reliance is only a *factor* in retroactivity analysis, not a requirement. *Atkinson*, 479 F.3d at 229. The Fifth Circuit erred by imposing a subjective reliance requirement in this case.

The Government focuses almost exclusively on *St. Cyr* and does not even attempt to address this Court's other retroactivity precedents. It is true that the Court in *St. Cyr* looked to the *quid pro quo* nature of plea agreements because that was the factual situation before it. Yet *St. Cyr* did not purport to hold that a showing of reliance on prior law is *necessary* to avoid retroactive application of a statute. Rather, the Court merely concluded that the *quid pro quo* nature of plea agreements was *sufficient* to show that applying IIRIRA § 304(b) retroactively would "attach[] a new disability, in respect to transactions or considerations already past." *St. Cyr*, 533 U.S. at 321.

---

[2] As the Government notes, the Fourth Circuit previously held in *Chambers* that IIRIRA § 304(b) is not impermissibly retroactive with respect to aliens convicted by a jury prior to its passage because they lack sufficient "reliance interests"—a factor it later found irrelevant in *Olatunji*. See *Chambers*, 307 F.3d at 290. The tension between *Olatunji* and *Chambers* only serves to highlight the confusion in the lower courts over the role of reliance in retroactivity analysis.

This Court's pre-*St. Cyr* precedent confirms that reliance is merely one factor in retroactivity analysis. See Pet. 18-20; MALDEF *Amicus* Br. After a thorough review of this Court's precedent, the Third Circuit reached the same conclusion in *Atkinson*: "The [Supreme] Court has never held that reliance on the prior law is an element required to make the determination that a statute may be applied retroactively." 479 F.3d at 227-28. In other words, "[i]mpermissible retroactivity, as defined in *Landgraf*, does not require that those affected by the change in law have relied on the prior state of the law." *Id.* at 229. Accordingly, the Third Circuit held that aliens convicted of an aggravated felony by a jury before IIRIRA remain eligible for § 212(c) relief. *Id.* at 230-31.

Contrary to the Government's assertions, *Atkinson* is fully consistent with this Court's retroactivity precedent. The *Atkinson* court correctly chose the conviction itself as the "relevant past event" for retroactivity analysis. *Ibid.* ("We emphasize that the important "event" to which IIRIRA attached a new legal consequence was the conviction."). As this Court recognized in *St. Cyr*, it is the conviction that triggers immigration consequences. 533 U.S. at 314-15 (noting that alien became both subject to deportation and eligible for § 212(c) relief at the time of guilty plea), *aff'g St. Cyr* v. *INS*, 229 F.3d 406, 418 (2d Cir. 2000) ("conviction * * * triggers the disqualification from § 212(c) relief"); see also *Thom* v. *Ashcroft*, 369 F.3d 158, 170 (Underhill, J., dissenting). After all, "absent a legal determination of guilt, the alien is not subject to deportation or in need of section 212(c) relief." *Atkinson*, 479 F.3d at 231 n.8; see also Pet. 26-27. The Government suggests (at 13) that this analysis is inconsistent with *Fernandez-Vargas*, but *Atkinson* explains that the situation of aliens like Rodriguez-Zapata is distinguishable because their convictions occurred in the past and cannot be changed. 479 F.3d at 230-31.

By imposing a "subjective reliance" requirement, the Fifth Circuit contravened this Court's precedent, which has consis-

tently considered reliance as merely one factor in retroactivity analysis. Accordingly, this Court should grant certiorari and reverse.

C. The Court should take this opportunity to resolve the split regarding reliance.

The Government offers no persuasive reason why this Court should wait any longer to resolve this important circuit split over the role of reliance in analyzing the retroactivity of IIRIRA § 304(b). The Government first asserts that the Court need not resolve the conflict because it affects only a "small and ever-diminishing class." Opp. 13. To the contrary, *St. Cyr* concluded that the number of aliens whose ability to remain in the United States depends on eligibility for § 212(c) relief is "extremely large." 533 U.S. at 296. Moreover, as the Government itself notes (at 4-5), this Court has received several petitions in the last few months that concern whether aliens convicted by a jury prior to IIRIRA remain eligible for § 212(c) relief. The 2007 decisions in *Atkinson* and *Carranza-de Salinas* further confirm that this issue is very much alive ten years after the passage of IIRIRA. In any event, this Court has granted certiorari in other cases involving far less numerous classes where, as here, important liberty interests are at stake. *E.g.*, *Abdul-Kabir* v. *Quarterman*, 127 S. Ct. 1654, 1674 (2007) (discussing line of cases that address small subset of Texas capital prisoners tried prior to 1991 who have mitigating evidence that could not be given effect under their jury instructions); see also *Bridges* v. *Wixon*, 326 U.S. 135, 154 (1945) ("That deportation is a penalty—at times a most serious one—cannot be doubted."); Pet. 28.

The regulations cited by the Government also present no impediment to this Court's review. As an initial matter, the Government did not raise the regulations below, and this Court rarely considers new arguments supporting the judgment. *E.g.*, *United States* v. *Estate of Romani*, 523 U.S. 517, 526 n.11 (1998). Moreover, these regulations do not alter the retroactivity analysis.

Both 8 C.F.R. § 1003.44 and 8 C.F.R. § 1212.3(h) were adopted by the Department of Justice in response to the *St. Cyr* decision. See *Section 212(c) Relief for Aliens With Certain Criminal Convictions Before April 1, 1997*, 69 Fed. Reg. 57,826 (2004). It is true that both regulations draw a distinction between aliens convicted after trial and those who pled guilty. See 8 C.F.R. § 1003.44(a); 8 C.F.R. § 1212.3(h). As the Department of Justice noted in its comments, however, this distinction was based on the decisions of the lower courts at that time. 69 Fed. Reg. at 57,828. The issue has been litigated heavily in the lower courts since 2004 and, as explained above, the courts have now come to varying conclusions.

Rule 1003.44 provided a mechanism for aliens covered by *St. Cyr* to file a "special motion" to reopen their removal proceedings. 8 C.F.R. § 1003.44(a). The deadline for such motions was April 26, 2005. See 8 C.F.R. § 1003.44(h). Because this deadline has now passed, the regulation has little relevance to the analysis here or in future cases.

Rule 1212.3 does appear to apply to current and future removal proceedings. Yet the distinction it draws between aliens convicted after a jury trial and those who pleaded guilty is subject to the same retroactivity challenges discussed in Parts A and B above. This Court and others have consistently applied the same retroactivity principles to both statutes and regulations. *E.g.*, *Regions Hospital* v. *Shalala*, 522 U.S. 448, 456 (1998) (applying *Landgraf* analysis to Medicare regulations); *Sweet* v. *Sheahan*, 235 F.3d 80, 89 (2d Cir. 2000) (applying *Landgraf* to proposed environmental regulations). Thus, the Court need not await further challenges to Rule 1212.3 before it can resolve the retroactivity issues presented by this case.[3]

---

[3] Notably, the Fifth Circuit in *Carranza-de Salinas* acknowledged these rules but did not find them relevant to its retroactivity analysis. 477 F.3d at 207.

D. The circuit split over due process protection for the right to seek § 212(c) relief is genuine and should be resolved.

Contrary to the Government's assertions, Rodriguez-Zapata's due process claim is not merely "academic." Opp. 17. Six circuits, including the Fifth Circuit, have held that aliens have no due process interest in the right to seek § 212(c) relief. Pet. 21-22. Two circuits, however, have held that the right to seek § 212(c) relief, though discretionary, is subject to due process protections. See *Copeland*, 376 F.3d at 72; *Ubaldo-Figueroa*, 364 F.3d at 1048. The Court should take the opportunity to resolve the circuit split on this significant constitutional issue.

The Government contends that *Copeland* and *Ubaldo-Figueroa* are inapposite because, in those cases, "there was no dispute that the alien had a statutory right to apply for relief under Section 212(c)." Opp. 16. Yet here, there can likewise be no dispute that Rodriguez-Zapata had a statutory right to seek § 212(c) relief. Rodriguez-Zapata became statutorily eligible for § 212(c) relief well before the passage of IIRIRA.

Under former § 212(c), an alien was eligible to seek discretionary relief from removal if the alien was: (1) a lawful permanent resident, (2) with "unrelinquished domicile of seven consecutive years," and (3) had not served five years or more in prison for an aggravated felony. See 8 U.S.C. § 1182(c) (1994). The regulations allowed an alien to apply for relief at *any* time after entering the country, even before the commencement of removal proceedings. 8 C.F.R. § 1212.3(b) (formerly 8 C.F.R. 212.3(b)) ("The application may be filed prior to, at the time of, or at any time after the applicant's departure from or arrival into the United States."); see *Carranza-de Salinas*, 477 F.3d at 207-08. Rodriguez-Zapata fulfilled these statutory criteria before IIRIRA became law. Pet. 6-7. Thus, Rodriguez-Zapata's statutory right

to § 212(c) relief had already vested well before it was eliminated by IIRIRA § 304(b).

Both the Second and Ninth Circuits have correctly recognized that this vested statutory right to seek § 212(c) relief is subject to due process protections. Even the Government concedes that "[i]f petitioner has a statutory right to seek Section 212(c) relief, he is entitled to a hearing on that application." Opp. 16. Because Rodriguez-Zapata was given no hearing, reversal is required.

This Court has previously recognized a due process interest in the right to seek discretionary relief. In *Accardi* v. *Shaughnessy*, 347 U.S. 260, 266-68 (1954), the Court held that removing the BIA's discretion over whether to grant suspension from deportation and replacing it with a mandate from the Attorney General violated due process. Even though the grant of relief itself was discretionary, the Court concluded that the alien was entitled to a hearing on his application, the "due process required by the regulations in such proceedings." *Id.* at 268; see also Immigration Clinic *Amicus* Br. 13-17. Likewise, once Rodriguez-Zapata's statutory right to § 212(c) vested (*i.e.*, when he met all of the statutory criteria to apply for relief), he became entitled to a hearing on the merits of his claim. The retroactive application of IIRIRA § 304(b) deprived Rodriguez-Zapata of this right in violation of due process.

CONCLUSION

For these additional reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted.

J. BRETT BUSBY
Counsel of Record
AMY P. MOHAN
Mayer, Brown,
Rowe & Maw LLP
700 Louisiana St., Suite 3400
Houston, TX 77002
(713) 238-3000

Counsel for Petitioner

MAY 2007